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Application No. 10/702,316: Group Art Unit 1616
Response dated February 22, 2007
Reply to Office Action of November 22, 2006

REMARKS

Claims 93-110 are currently pending in the instant application. Claim 110 has been withdrawn by the Examiner pursuant to a Restriction Requirement. The Undersigned has discussed the issues raised in the Office Action with Examiner Handy and her supervisor, Dr. Johann Richter, and expresses his appreciation for the courtesy and consideration extended by Examiner Handy and Dr. Richter during the Interview.

Restriction Requirement

The Examiner has restricted the claims of the present application as follows:

- I. Claims 93-109 to a food additive composition; and
- II. Claim 110 to a method of reducing the adsorption of cholesterol by combining the food additive composition, encompassed by claims 93-109, to a cholesterol-containing food, for administration of the combination to a mammal.

On October 24, 2006, the Undersigned elected by telephone, with traverse, the subject matter of Claims 93-109 for prosecution on the merits, which election is affirmed herein. The election remains traversed for the following reasons.

As noted by the Examiner, rejoinder of Claim 110 to the method is appropriate in the present application where the withdrawn claim is commensurate in scope with the allowed claims directed to the product.

As discussed during the Interview, Claim 110 contains all of the limitations of Claim 93, the independent claim directed to the food additive composition. See elements (a), (b), (c), and (d) of the food additive composition recited in Claims 93 and 110.

With allowable product claims, rejoinder of Claim 110 would be proper and appropriate in the present application, as noted by Dr. Richter in the Telephone Interview.

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Double Patenting

Claims 93-109 have been rejected for obviousness-type double patenting as being unpatentable over Claims 1-5, 7, 8, 11, 12, and 13-18 of US Pat. No. 6,394,230 ('230).

As discussed during the Interview, the Double Patenting rejection is respectfully submitted to be in error and improper in view of the fact that the present application is a Divisional application of '230 and the subject matter of the present claims was the subject of a Restriction Requirement in '230. As noted in the Preliminary Amendment, Claims 93-110 correspond to original Claims 11-27 and 48, respectively, in the application that issued as '230.

As described in MPEP 804.01, "the third sentence of 35 USC 121 prohibits the use of a patent issuing on an application with respect to which a requirement for restriction has been made, or an application filed as a result of such a requirement, as a reference against any divisional application. The 35 USC 121 prohibition applies only where the Office has made a requirement for restriction."

Here, the Office issued a Requirement for Restriction in '230. The present application is a Divisional application of '230. Accordingly, a Double Patenting rejection of the present application over '230 is prohibited under 35 USC Section 121 and should be withdrawn.

The Examiner is therefore kindly requested to withdraw the Double Patenting rejection of Claims 93-109.

Rejoinder of Claim 110

Claims 93-109 are thus allowable (there are no other rejections of these claims). Accordingly, rejoinder of Claim 110 in the present application, as discussed with Dr. Richter and Examiner Handy, is respectfully requested, since Claim 110 contains all of the limitations of Claim 93 to the food additive composition.

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Fees

No additional fees are believed due, but the Commissioner is authorized to charge (or credit any balance) any fees deemed due (or owing) to Deposit Account No. 50-1177.

Conclusion

Favorable reconsideration and an early Notice of Allowance of Claims 93-110 are respectfully solicited.

Respectfully submitted,

NORMAN MILSTEIN, et al.

February 22, 2007

(Date)

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